(1) Supreme Court, U.S.
FILED

00-331 AUG 22 2000

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

October Term, 1999

BRENDA HOFHERR,
Petitioner,
vs.
VISTA IRRIGATION DISTRICT,
JOHN AMODEO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is an employee who has been subjected to wrongful retaliation and demotion in violation of public policy, breach of written contract of employment and whose Constitutional rights have been violated under color of law in violation of 42 U.S.C. §1983, entitled to recover provable consequential damages sustained as a result of her reasonable efforts to mitigate her damages by seeking other employment?

Alternatively, if such an employee may not recover damages arising from her reasonable efforts to mitigate her damages by seeking other employment, may she recover the consequential damages she would have sustained but for her reasonable but unsuccessful attempt to mitigate?

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JURISDICTIONAL GROUNDS FOR PETITION

This Petition for Writ of Certiorari seeks review of an unpublished decision of the United States Court of Appeals for the Ninth Circuit dated May 24, 2000.[1]

[1] Brenda Hofherr v. Vista Irrigation District, et al., (2000) Ninth Circuit Case Number 98-56158. The decision is reproduced in Appendix "A" hereto. Specific page references to this Opinion will be designated as "App.1a," "App.2a," and so on.

This Petition is proper and timely pursuant to Rules of the Supreme Court of the United States, Rule 13.1 and 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Statement of Facts

Plaintiff/Appellant/Petitioner Brenda Hofherr, ("Hofherr" or "petitioner") was hired by Vista Irrigation District ("VID"), a public entity or agency chartered by the County of San Diego, State of California, in November 1991. Hofherr was hired for the position of Director of Safety and Training. She was also responsible for overseeing VID's environmental policies and compliance efforts and was formally designated by Tom Wilson, then-General Manager, as the contact person for environmental compliance issues. She successfully resolved a number of environmental matters. Hofherr became a permanent employee who could be terminated only for good cause in November 1992.

In January 1995, VID's largest environmental project was an underground storage tank site at Lake Henshaw, the lake from which drinking water is provided to local residents. On January 13, 1995, a preliminary site assessment report was issued by an independent site consultant which indicated the presence of benzene, a known carcinogen, in wells monitoring the plume between the tank site and the nearby lake.

On January 13, 1995 Hofherr met with defendant John Amodeo, the new general manager of VID following Wilson's retirement, and reported to him that the consultant's site assessment revealed benzene. Amodeo told Hofherr that VID should simply pump out the contaminated water and refill the wells with fresh water before the scheduled County samples were taken. Hofherr was shocked at this suggestion and told Amodeo that would be illegal.

On January 18, 1995 Hofherr attended a staff meeting with Amodeo and other high level VID personnel to discuss the consultant's site assessment report. Hofherr supported the consultant's recommendation of further site assessment to determine how far the benzene had traveled. According to plaintiff, the rest of the attendees, including Amodeo, were interested instead in figuring out how to minimize the results of the assessment because they wanted to avoid the costs of any further testing or remediation.

The next day, on January 19, 1995, Amodeo informed Hofherr that she was being demoted and was having her responsibility for Lake Henshaw taken away. Amodeo told Hofherr that he would not cut her pay.

On January 20, 1995 Amodeo told Hofherr that no demotion or shift in responsibility would be made until a new Assistant General Manager was hired. Nevertheless, changes began to occur. Hofherr's secretarial support and her parking space were taken away, and key files for which she was responsible were moved from her office.

On March 27, 1995, Hofherr sent a confidential memo to Amodeo informing him that she had informed the County that there might be an attempt to tamper with the Henshaw monitoring wells. According to Hofherr, she sent this memo in confidence to try to work within the system, encourage Amodeo to retract his stated intentions, and to help Amodeo get on track with appropriate testing and remediation.

Amodeo was apparently enraged to find out that the County had been notified, even though his name had not been used. Amodeo went to Hofherr's office the next day, angrily pounded on her door and yelled at her. Amodeo then "went public", enlisting statements from various attendees of the January 18 meeting, despite the fact that the comments Hofherr had complained about were made in the meeting on January 13. By a responsive memorandum dated March 28, 1995, Amodeo claimed that any comments he had made about unlawful acts regarding the cleanup of the site were made in jest.

The issue was further aired at the next VID Board meeting on April 5, 1995. Hofherr informed the Board that Amodeo had told her that he had suggested he wanted to tamper with wells or otherwise ignore and/or stall on any assessment and remediation efforts.

On May 5, 1995, Amodeo sent Hofherr a memo stating that her demotion would take effect on May 12th . Despite his earlier promise that her demotion would not include a pay-cut, he advised her that her pay would be cut by approximately $14,000 per year.

Hofherr responded on May 26, 1995 with a memorandum stating that she felt she was being subjected to a series of unreasonable and retaliatory actions because of her efforts to motivate Amodeo to timely and lawfully meet VID's environmental compliance obligations. Hofherr requested Amodeo to reconsider the punitive actions he had taken against her.

Although Amodeo had provided Hofherr with a rapid, next-day response to her March 27th memo, she received no response, written or oral, to her May 26th memo. Convinced that no relief would be forthcoming, Hofherr decided to mitigate her damages to the best of her ability by resigning from VID and accepting a job offer she had with Hallmark Circuits. The Hallmark position was substantially equivalent to the demoted position at VID, but would provide Hofherr with the opportunity to advance again to salary and responsibility comparable to her former position at VID. She felt that advancement at VID was no longer possible.

Hofherr sent Amodeo a memo advising him of her resignation on June 13, 1995. Amodeo responded with a memo indicating his "shock" that she had resigned and explaining that he had been too busy to yet finalize a response to her May 26th letter.

Subsequently, Hofherr resigned from Hallmark Circuits when it became apparent that the job turned out to be less than promised.

Procedural History

Hofherr filed a Complaint against VID and Amodeo in the Southern District of California on January 31, 1996. The Complaint alleged causes of action for violation of 42 U.S.C. 1983, wrongful retaliation, demotion and termination in violation of public policy, breach of her employment agreement and breach of the implied covenant of good faith and fair dealing.

The district court granted summary judgment in favor of the defendants as to the causes of action for breach of the employment agreement, wrongful discharge in violation of public policy, breach of the implied covenant, and several of plaintiff's claims under 42 U.S.C. 1983. The court denied summary judgment as to plaintiff's cause of action for wrongful retaliation and demotion in violation of public policy and her section 1983 claims for First Amendment violations.[2]

Prior to trial on the remaining claims, the parties brought in limine motions regarding admission of damage evidence. Petitioner asserted that she should be allowed to present evidence of the consequential damages flowing from her reasonable efforts to mitigate her damages through employment at Hallmark and other entities because she would not have been put in the position of attempting to mitigate were it not for the wrongful acts of defendants in the first place. Defendants contended that plaintiff can not assert or recover consequential damages because the District Court ruled that her resignation was voluntary and not a constructive discharge. The district court adopted the defense position and ruled that plaintiff would be precluded from presenting any evidence arising out of the alleged retaliatory demotion after the date of her resignation. The

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2 The district court order granting in part and denying in part defendants' summary judgment motion is reproduced in Appendix B hereto.

effect of this ruling was to limit plaintiff's damages to about $1,800, the loss of income she sustained for the one month period she worked at VID after having been demoted and prior to her resignation.[3]

In light of the court's ruling limiting plaintiff's potential damages to a one-month period, the parties stipulated that plaintiff would irrevocably waive any damage claims for her remaining causes of action which had not been previously excluded by the court. This waiver, coupled with the Court's prior partial grant of summary judgment, resolved all pending causes of action. Accordingly, Judgment was entered in favor of defendants on May 18, 1998.

On appeal, the Ninth Circuit reversed the order granting summary judgment as to the breach of contract claim, but affirmed the trial court's preclusion of all evidence of plaintiff's consequential damages flowing from the conduct of the defendants.[4] For the reasons set forth below, the District Court erred in its damage analysis and the Ninth Circuit erred in affirming this ruling.

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3 The district court's ruling on the in limine motions is reproduced in Appendix C hereto.

4 Apart from a single sentence, the Ninth Circuit decision fails to address the merits of the damage argument. The Ninth Circuit decision concludes that plaintiff failed to appeal the ruling that Hofherr was not constructively discharged and absent constructive discharge, she cannot recover post-quit damages. (App. 6A). Petitioner takes issue with this conclusion. As is discussed more fully below, the entire discussion of damages, which was extensively briefed by both parties to the appeal, subsumes the constructive discharge claim. Even VID concedes that the standard for constructive discharge is whether a reasonable employee would have found the employment circumstances so intolerable that they would quit. The damage issue as framed by petitioner necessarily requires a finding by the jury as to the reasonableness of Hofherr's decision to quit and mitigate her damages by seeking comparable employment elsewhere.

ARGUMENT

I.

PLAINTIFF SHOULD HAVE BEEN ENTITLED TO PROVE AND RECOVER DAMAGES CONSEQUENTIAL TO HER DEMOTION, INCLUDING POST-RESIGNATION DAMAGES FLOWING FROM HER REASONABLE EFFORTS TO MITIGATE HER DAMAGES

Employment law has always recognized that an employer is liable for all tort damages, including consequential damages, flowing from an unlawful act against public policy, such as wrongful termination, retaliation or demotion. (*Foley* v. *Interactive Data Corp.* (1988) 47 Cal.3d 654, 665-669, 765 P.2d 373; *Smith* v. *Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 512-513, 196 Cal.Rptr. 916, California Book of Approved Jury Instructions ("BAJI") 10.43)

Partly because of the tortfeasor's liability for consequential damages, the law also imposes on all damaged parties a duty to make reasonable efforts to mitigate damages rather than allow damages to pile up. (Ninth Circuit Manual of Model Jury Instructions 7.03; *Parker* v. *Twentieth Century-Fox* (1970) 3 Cal.3d 176, 181; BAJI 10.16) It follows that the tortfeasor is liable for consequential damages resulting from the victim's reasonable attempts to mitigate because the victim would not have been required to mitigate at all but for the original unlawful acts of the tortfeasor.

This type of liability for additional injury is expressly recognized in the personal injury context. For example, BAJI 14.66 (Damages - Additional Harm Resulting From Original Injury) provides that:

> If you find that the defendant is liable for the original injury to the plaintiff, such defendant is also liable . . . for any injury sustained in a subsequent accident which is a normal consequence of an impaired physical condition caused by the original injury and which would not have occurred had the plaintiff's physical condition not been impaired. [emph. added]

The same principle can and should be applied here. In this case, plaintiff alleges that defendants injured her by wrongfully demoting her under color of law and in retaliation for a protected activity. This demotion included not just a cut in pay, but also a major loss in responsibility, authority, and status, i.e., the things that make a job interesting, enjoyable and personally fulfilling. Hofherr would have presented evidence at trial that defendants intended to and did in fact cause her, in her new, demoted status, to become a persona non grata who was permanently banished from the high-level role she had enjoyed at VID. As a result, had Hofherr remained at VID, she would not only have suffered a salary loss of at least $14,000 per year, exclusive of benefits, but also the loss of the enjoyment of the director-level job for which she was qualified, from May 12, 1995 until such time as she retired from the District.[5] It is undisputed that had Hofherr stayed at VID, she would have been entitled to sue VID for damages arising from the alleged retaliatory demotion and that her damages flowing from that conduct would have continued for as long as she continued in a demoted position with VID.

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[5] Plaintiff's economist was prepared to testify that plaintiff's worklife expectancy at the time of her demotion was 11.19 years.

Faced with this clear damage picture, Hofherr chose to do what the law expects from her: She attempted to mitigate this certain injury by taking a position with Hallmark. The Hallmark position was comparable to her new, demoted position at VID, but offered an opportunity to advance to a better position, complete with higher level salary and responsibilities similar to the ones she had lost at VID. This opportunity no longer existed at VID. Unfortunately, through no fault of her own, the Hallmark job did not deliver what it had offered, and Hofherr left that employment.

Thus, Hofherr's resignation from VID to accept what she hoped would eventually be a better position at Hallmark, comparable to the one from which she was wrongfully demoted at VID, was clearly a reasonable attempt to do what the law requires: to mitigate damages which were caused by VID's tortious and retaliatory demotion of plaintiff. Accordingly, these defendants, like any other tortfeasors, should be liable for the consequential losses incurred through these reasonable mitigation efforts because Hofherr would not have been in the position to attempt to mitigate but for the damage she was certain to suffer as a result of the tortious and wrongful demotion. These damages would include lost wages, benefits and enjoyment after her resignations from VID and Hallmark.

Asserting that *Rochlis* v. *Walt Disney Co.* (1993) 19 Cal.App.4th 201, 23 Cal.Rptr.2d 793 precludes recovery of "post-quit" damages, defendants claimed below, and the courts agreed, that Hofherr cannot recover losses directly attributable to her demotion after she resigned. Thus, the court limited her losses to the difference in salary she experienced for the one month before she resigned, approximately $1800. Defendants and the court are mistaken.

First, Rochlis was a breach of contract case in which the appellate court affirmed the trial court's summary judgment based on finding no breach, not a tort action based on violation of public policy. More important, however, the court found that the plaintiff in Rochlis had not and would not suffer any damage prior to his resignation. This is the opposite of Hofherr's situation in which she was guaranteed a loss of at least $230,000 in compensation alone due to her demotion. Defendants even concede that she had already lost $1800 in the one month before she resigned.

In contrast, the undisputed evidence in Rochlis was that plaintiff, a top-level executive with a division of Disney, negotiated with Disney for a new position, with higher pay, benefits, and responsibility. When Mr. Rochlis later decided that the job was more difficult than he had anticipated, and that he should get paid more than he had bargained for, he tried (and failed) to renegotiate his deal upward again. Frustrated, he quit. The Court understandably found that top-level positions are difficult, and that Disney was not obligated to renegotiate. The Court also found that Disney had complied with the actual agreement, and thus there was no breach. Since there was no breach, there was no damage and the trial court was correct in granting summary judgment against Rochlis.

Hofherr's situation could not be more different. Here, the District Court determined that there is a triable issue as to whether defendants "breached" public policy in demoting and retaliating against Hofherr.(App.10-12b) Thus, Hofherr's claim, unlike Rochlis' claim, sounds in tort. It is also undisputable that the result of that breach was an unnegotiated demotion to a position with lower pay and lower responsibility. That lower position carried with it a certain loss in compensation alone, of at least $230,000. Thus, Hofherr, who undisputedly would have been damaged in an amount well in excess of $230,000 even had she accepted the demotion and done nothing, is in a very different position than was the un-damaged Mr. Rochlis.

It is a bedrock principle of employment law that an employee need only seek replacement employment that is comparable to the former employment. Simply stated, an employee's failure to seek other available employment, or her rejection of such employment, is justified if the other available employment is different from or inferior to the job she held with the ex-employer. (See *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F.2d 1338, 1345; *California School Employees Ass'n. v. Personnel Comm'n.* (1973) 30 Cal.App.3d 241, 248-49, 106 Cal.Rptr. 283, 288-289.)

By arguing that plaintiff's acceptance of the Hallmark job cut off her right to recover damages from VID for its retaliatory demotion, defendants have essentially argued that they should reap the benefit of plaintiff's prudence in attempting to mitigate this loss.[6] The position presents a gross anomaly in the law: An employee wrongfully discharged is entitled to full recovery and, while under duty to mitigate, need not accept different or inferior employment. In contrast, VID claims that a wrongfully demoted employee has no such right of full recovery. The wrongfully demoted employee is either forced to accept the different and inferior employment (with an employer who has wronged her, no less), or the employee can quit. Of course, if she quits, then she is entitled to no recovery at all. The absurdity of this argument is manifest and wholly at odds with tort law. It enables the tortfeasor to obtain a windfall from the injured party's reasonable efforts at mitigation.

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6 The argument is ironic in light of the fact that if plaintiff had done what defendants are now suggesting she should have done, quietly accept the demotion and the accompanying losses in income, benefits, status and enjoyment, they would have undoubtedly argued that plaintiff could not recover for such losses because she had failed to mitigate her damages. Conversely, if plaintiff had retained her employment with Hallmark, defendants undoubtedly would have argued that she sustained no (or reduced) damages.

Fundamentally, there is no justification to create a regime where an employer who violates public policy in retaliating against an employee is punished if they actually terminate the employee but escapes punishment if they "merely" demote the employee. Such a regime would actually create perverse incentives for an employer seeking to retaliate against an employee to radically demote her, confident that the employee will then quit without remedy, rather than terminating the employee who would then have a right of recovery. Consider, would it make sense for the law to treat a case in which a Michael Eisner is terminated in violation of public policy differently from a case in which he was wrongfully demoted from a multi-million dollar CEO to a minium wage ticket taker?

This analysis begs the question, "what is reasonable mitigation in the face of a wrongful demotion?". That is, if there is a line to be drawn as to what level of demotion should trigger punishment, where is such line drawn? The only appropriate line-drawing mechanism is inferred from the law of mitigation in wrongful discharge cases, and is simply a test of reasonableness.

By arguing that all damages are cut off, VID suggests that quitting to seek a position more comparable to the pre-demotion position is always unreasonable. Such a determination regarding reasonableness, however, should be made by a jury. Indeed, that is the province of the jury in all of tort law.

The Ninth Circuit relies on *Turner* v. *Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1246, 32 Cal.Rptr. 2d 223 for the proposition that an employee cannot quit and sue for post-resignation damages without showing constructive discharge. (App. 6A) However, constructive discharge is itself, a fictional construct designed to determine whether an employee reasonably mitigated an intolerable working environment by quitting. *Turner v. Anheuser-Busch, Inc.*, *supra*, 7 Cal.4th 1238, 1251 (constructive discharge if "the employer

intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable employee would be compelled to resign.") For this reason, any consideration of constructive discharge is simply subsumed in the larger question of whether a wrongfully demoted employee reasonably mitigated her losses by both quitting and seeking employment more comparable to the pre-demotion position. The entire question is based on reasonableness, and that is the province of the jury.

Indeed, a jury can just as easily determine whether a particular employee took reasonable steps to mitigate losses from a wrongful demotion as from a wrongful termination. If a jury concludes that Hofherr's quitting was an unreasonable attempt to mitigate the certain losses occasioned by her wrongful demotion, it will not award damages. On the other hand, if a jury concludes that Hofherr's quitting to seek more comparable employment than the different and inferior employment forced on her by VID was reasonable, they will award damages to the extent it believes her actions were reasonable.

Defendants themselves stated below that "whether a claim arises in contract or tort, a plaintiff cannot collect damages which were not proximately caused by the allegedly wrongful acts of defendants." True, but the converse is also true: for claims arising in tort, a plaintiff can collect damages which were proximately caused by the wrongful acts of defendants. Here, plaintiff's demotion, if proved to be wrongful, proximately caused plaintiff's damage. The amount of the damage depends on whether or not plaintiff was required to mitigate her damage. If she was not, as defendant's assert, then the amount of her damage is the total of her provable compensatory and general damages had she stayed in VID's employment after the demotion. If she was required to mitigate her

damages, then, like any tort victim, she is entitled to recover those consequential damages which are proximately caused by defendants' conduct, including damages arising from a reasonable but unsuccessful effort at mitigation. Plaintiff's reasonable but unsuccessful effort to mitigate her damages by seeking other, better employment was a foreseeable consequence and proximate result of defendant's wrongful demotion. Accordingly, under this scenario, plaintiff should be entitled to prove up her post-resignation losses, including those sustained after the Hallmark job proved to be inferior to the VID job from which she had been demoted.

Under either scenario the amount of damages is a question of fact which should have been presented to the jury. Accordingly, in order to achieve consistency between wrongful discharge cases and wrongful demotion cases, this Court is respectfully requested to find that a plaintiff's efforts to mitigate damages from a wrongful demotion should be analyzed within a tort framework of reasonableness. Accordingly, the District Court's ruling precluding plaintiff from presenting evidence as to her post-resignation damages, which was affirmed by the Ninth Circuit, was erroneous as a matter of law and must be reversed.

II.

ALTERNATIVELY, PLAINTIFF SHOULD HAVE BEEN PERMITTED TO PRESENT EVIDENCE OF DAMAGES ARISING FROM VID'S RETALIATORY DEMOTION ASSUMING SHE HAD MADE NO EFFORT TO MITIGATE

Assuming that plaintiff had been able to prove that she was demoted in retaliation for a protected activity, she would have been entitled to damages for that demotion, including lost wages and lost benefits, which plaintiff's economist calculated to be approximately $230,000 plus general damages for the loss of enjoyment of the status and responsibility she previously enjoyed as Director of Safety

and Training at VID. However, faced with a quantifiable loss of $230,000 as well as significant general damages, rather than simply accept the demoted position and its accompanying losses, plaintiff attempted to do what the law requires of plaintiffs, and mitigate her damages by obtaining another job with another company which promised to eventually provide her with advancement to a position similar to the one she had been deprived of at VID.

The district court granted and the Ninth Circuit affirmed defendants' request to exclude all evidence of the fact that Hofherr resigned from VID and any facts subsequent to that resignation, including her Hallmark employment and resignation. This ruling necessarily assumes that plaintiff had no duty to mitigate, and could have and should have simply accepted the demotion, stayed at VID and sued to recover the losses which accompanied that demotion, including $230,000 in special damages plus general damages to be assessed by the jury arising out of her loss of status, responsibility and job enjoyment. Assuming the correctness of the district court's ruling precluding evidence of damages flowing from Hofherr's attempt to mitigate her damages, then Hofherr should have been able to recover the amount of damages she would have sustained had she stayed at VID and made no attempt to mitigate her damages at all.

If, however, as petitioner contends, she did have an obligation to mitigate her damages, then defendants, like all tortfeasors, should be required to bear the risk of the mitigation consequences, including loss from the unsuccessful but reasonably undertaken attempts to secure substitute employment equivalent to the employment she lost upon demotion at VID.

CONCLUSION

For all the foregoing reasons, this Court is respectfully requested to grant certiorari to consider the important and far-reaching question of whether an employee who is wrongfully demoted under color of law in violation of public policy and 42 U.S.C. §1983, is entitled to recover consequential damages sustained as a result of her reasonable efforts to mitigate her damages in accordance with fundamental tort principles.

Respectfully submitted,

DATED: August 21, 2000

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED MAY 24, 2000
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

BRENDA HOFHERR,	)	No. 98-56158
	)	
Plaintiff-Appellant,	)	D.C. No. CV-S-96-182-BTM
	)	
v.	)	
	)	MEMORANDUM*
VISTA IRRIGATION	)	
DISTRICT, JOHN AMODEO,	)	
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court
for the Southern District of California
Barry Ted Moskowitz, District Judge, Presiding

Argued and Submitted February 10, 2000
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36.3

Before: RYMER and FISHER, Circuit Judges, and GEORGE,** District Judge.

In May 1995, Vista Irrigation District (Vista) reclassified Brenda Hofherr's job downward and cut her salary. A month later, she quit her job. Hofherr now appeals the district court's rulings that (1) her cut in pay did not violate her employment agreement, and that (2) her damages were limited to those she suffered before she quit.

We have jurisdiction pursuant to 28 U.S.C. §1291. We hold that summary judgment was inappropriate as to Hofherr's claim for breach of contract, because her employment agreement is ambiguous as to whether Vista could cut her salary. However, as Hofherr was not constructively discharged, the district court properly limited her damages to those she suffered before she quit her job.

I.

We review de novo the district court's grant of summary judgment on Hofherr's claim for breach of employment agreement. *Robi v. Reed,* 173 F.3d 736, 739 (9th Cir.), *cert. denied,* 120 S.Ct. 375 (1999). We agree with Vista that, pursuant to its most natural construction, Paragraph 3.1 seemingly granted Vista sole discretion to reduce Hofherr's salary upon her downward reclassification. But the issue on appeal is not whether Paragraph 3.1 can be reasonably construed to apply to Hofherr's downward reclassification. Rather, the issue before this court is whether Paragraph 3.1 is also susceptible to a different, but reasonable, construction by which it would *not* apply to Hofherr's downward reclassification.

We conclude that Paragraph 3.1 is reasonably susceptible to such a construction. In particular, we find that the last sentence of the paragraph is subject to the following interpretation: if (a) Hofherr is

** Honorable Lloyd D. George, Senior United States District Judge for the District of Nevada, sitting by designation

promoted to a higher position or (b) her present position is reclassified [to include expanded duties or responsibilities] at the discretion of Vista, then her base salary shall be changed [upward] to an amount which in the sole discretion of Vista is commensurate with her new position. This is the construction urged by Hofherr.

Hofherr's reading of the last sentence of Paragraph 3.1 is supported by the positive thrust of that sentence, which includes a specific reference to promotions. Notably absent is any reference to demotion. Hofherr's expectation could have been that the employment agreement and her status at Vista in the future would involve increased--rather than decreased--duties and responsibilities, and, therefore, it is possible that she read and understood the "promotion" language in this light.

Further, we note that other Vista employees, if reclassified downward, had a salary floor. Hofherr's argument that she would not knowingly agree to lesser protection is persuasive. It is difficult to understand the purpose of Hofherr's entering into the employment agreement if both her position *and* her salary could be drastically downgraded unilaterally, thereby giving her no job security despite her shift from a provisional employee to a permanent executive. Conversely, reading the sentence (and its mandatory ("shall") adjustment in the event of a reclassification) as overriding the permissive ("may") for such adjustments included in the second paragraph of Article 9.5 of the VISA Memorandum gives Hofherr greater rights, as an executive, than regular employees — a concept consistent with an executive's individualized employment agreement. This is a benefit even though the amount of the adjustment is at the discretion of Vista.

We must also determine whether the employment agreement incorporated Article 9.5 of the VISA Memorandum, which would then govern Hofherr's downward reclassification. We conclude that the employment agreement is reasonably susceptible to this interpretation. Pursuant to Paragraph 3.1, the VISA Memorandum is "made a part" of the employment agreement. The employment

agreement implicitly includes various provisions of the VISA Memorandum (such as benefits provisions). More importantly, the employment agreement both explicitly and implicitly *excludes* certain provisions of the VISA Memorandum.. As a result, the employment agreement can be reasonably construed as incorporating the entire VISA Memorandum, except those provisions that are expressly or implicitly excluded therefrom. Pursuant to this construction, the employment agreement would incorporate Article 9.5.[1]

It is true that specially drafted provisions of a contract control general provisions, Civ. Code §165 1; *see also American City Bank v. Zetlen,* 253 Cal. App. 2d 548, 61 Cal. Rptr. 311 (1967), and that, in contrast to Paragraph 3.1, Article 9.5 was prepared without special reference to either Hofherr or her employment agreement. However, if Wilson's testimony (discussed below) is credited, the general provision of the VISA Memorandum would govern because the specific provision of the employment agreement would not apply to downward reclassifications.

As the employment agreement is reasonably susceptible to the interpretation argued by Hofherr, extrinsic evidence can be properly considered to resolve the ambiguities. *See Pacific Gas & Elec. Co. v. G. W Thomas Drayage & Rigging Co.,* 69 Cal. 2d 33, 37, 69 Cal. Rptr. 561, 442 P.2d 641 (1968) ("The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on

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1 The dissent's argument that Article 9.5 settles this dispute by defining a "reclassification" as "an existing position that is rewritten to include expanded or reduced duties and responsibilities" is unpersuasive. In Article 9.4, the VISA Memorandum also defines "promotion," which it explains is a "reclassification to a position at a higher rate of pay." Therefore, contrary to the dissent's suggestion, these two terms (promotion and reclassification) do not describe "distinct, separate, and unrelated circumstances." Given that a promotion is but one form of reclassification and that the definition for promotion prescribes that an increase in pay will result, application of these definitions further supports the conclusion that Paragraph 3.1 is ambiguous.

its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible."). Hofherr submitted the declaration of Tom Wilson, the former general manager of Vista. In paragraph 8 of his declaration, Wilson states:

> I understood and intended [Paragraph 3.1] to refer to "higher positions"as expressed in the language. In the event of a reduction of responsibilities or downward reclassification, however, I intended that [Vista] follow and be bound by the VISA Memorandum....

In paragraph 5, Wilson declares that Hofherr's employment agreement "incorporates throughout the VISA Memorandum.. . ." Moreover, in paragraph 10, Wilson explains that he had "on a previous occasion... Y-stepped salaries, when the District conducted a District-wide salary survey." These assertions are competent evidence that Paragraph 3.1 was intended to apply only to upward reclassifications and that Article 9.5 was incorporated in Hofherr's employment agreement.[2] This evidence supports Hofherr's contention that the parties incorporated Article 9.5 into Hofherr's employment agreement to govern in the event that Vista reclassified Hofherr downward. Accordingly, Wilson's declaration is sufficient evidence to preclude a grant of summary judgment.[3]

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2 We note, however, that our holding is limited to whether the employment agreement is reasonably susceptible to Hofherr's proposed interpretation. We do not suggest that this is, in fact, the correct interpretation. We leave that determination to the district court and to the trier of fact.

3 Wilson's declaration does not require a grant of summary judgment in favor of Hofherr. Vista is free to explore the credibility of Wilson's proffered testimony and to offer its own evidence regarding the company's "Y-stepping" practices.

II.

We review de novo the district court's legal conclusion precluding Hofherr' s post-resignation damages. *EEOC v. Wal-Mart Stores, Inc., 156* F.3d 989, 992 (9th Cir. 1998).

An employee cannot quit and sue for post-resignation damages without showing constructive discharge—that is, without showing that "[t]he conditions giving rise to the resignation [are] sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job." *Turner v. Anheuser-Busch, Inc.,* 7 Cal. 4th 1238, 1246, 32 Cal. Rptr. 2d 223 (1994). The district court ruled that Hofherr was not constructively discharged, a ruling she has not appealed. Accordingly, she cannot recover any damages incurred subsequent to her resignation.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with the above. Each party to bear its own costs.

Hofherr v. Vista Irrigation District, No. 98-56158.

GEORGE, Judge, Dissenting as to Part I.

This panel was asked to "ascertain and give effect to [the intention of the parties] by determining what the parties meant by the words they used." *Pacific Gas & Elec. Co. v. G. W Thomas Drayage & Rigging Co.,* 69 Cal.2d 33, 38, 69 Cal.Rptr. 561, 442 P.2d 641 (1968). Specifically, the panel was asked to ascertain whether, in using the words "present position.. . reclassified," the parties meant (a) the expansion or reduction of duties and responsibilities, or (b) the expansion, but not the reduction, of duties and responsibilities. Hofherr and Vista greatly simplified this task when, within the employment agreement, they specifically agreed upon and expressed

what they meant by the reclassification of a present position. In the first paragraph of Article 9.5, Vista and Hofherr defined reclassification of a position "as an existing position that is rewritten to include expanded or reduced duties and responsibilities." As the parties incorporated this definition into their employment agreement, it is this definition that must be used to interpret Paragraph 3.1. Cal. Civ. Code § 1641. By substituting the parties' definition of reclassification of a position into the last sentence of Paragraph 3.1, that sentence clearly and unambiguously reads:

> Should [Hofherr] be promoted to a higher position or her present position be [rewritten to include expanded or reduced duties and responsibilities] at the discretion of the General Manager and Chief Engineer, then her Base Salary shall be changed to an amount which in the sole discretion of the General Manager and Chief Engineer is commensurate with her new position.

I cannot agree with the majority that this sentence is reasonably susceptible to the interpretation postulated by Hofherr: that the reduction of her duties would not trigger a mandatory change in her salary.[1]

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1 Contrary to the majority's suggestion in its first footnote, the definition of "promotion" set forth in Article 9.4 further supports the conclusion that Paragraph 3.1 is not reasonably susceptible to Hofherr's suggested interpretation. Substituting the definitions of both Article 9.4 and 9.5 into the last sentence of Paragraph 3.1 provides:

> Should [Hofherr] be [reclassified to a] higher [position at a higher rate of pay] or her present position be [rewritten to include expanded or reduced duties and responsibilities] at the discretion of the General Manager and Chief Engineer, then her Base Salary shall be changed to an amount which in the sole discretion of the General Manager and Chief Engineer is commensurate with her new position.

The sentence remains clear and unambiguous, pursuant to the definitions agreed upon by the parties, that a reduction of duties triggers a required change in salary commensurate with the reduction of duties.

Unfortunately, the failure to acknowledge and rely upon the parties' contractual definition of reclassification of a position is but one error. Paragraph 8 of Wilson's declaration is relied upon, although the paragraph is inadmissible. California contract law prohibits the admission of all extrinsic evidence under the circumstances of this case. Extrinsic evidence is not admissible if it is "feasible to determine the meaning the parties gave to the words from the instrument alone." *Pacific Gas,* at 38. As the parties agreed upon and expressed the meaning of reclassification of a position in the first paragraph of Article 9.5, it is feasible to determine the meaning of "present position.. . reclassified" from the words of the employment contract alone.

Further, "extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract. . . ." *Id,* at 39. The purpose of Wilson's declaration, however, is to detract from and vary the terms of Paragraph 3.1. The parties used the phrase "present position.. . reclassified" to identify an event triggering an obligation on the part of Vista. The parties defined that event to include the reduction of duties and responsibilities. Wilson's declaration to the contrary is extrinsic evidence that is not admissible.

The parties' identification of a "promotion" as one event triggering the required salary change does not permit the conclusion that the last sentence of Paragraph 3.1 is reasonably susceptible to an interpretation limiting Vista to increasing Hofherr's salary. The last sentence identifies two distinct, separate, and unrelated circumstances (promotion and reclassification)[2] that would trigger a

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2 I am perplexed by the majority's conclusion in its first footnote that a promotion is not a distinct and separate circumstance from the reclassification of a position, because a promotion is defined in Article 9.4 as one form of "reclassification." The VISA Memorandum plainly and unambiguously defines the distinction between each of these circumstances. The former refers to a positive change that acts upon the employee (the reclassification of the employee); the latter refers to either a positive or a negative change that acts upon the position (the reclassification of the existing position).

specific obligation on the part of Vista (to change Hofherr's salary). The last phrase of this sentence specifies Vista's obligation: "then her Base Salary shall be changed to an amount which in the sole discretion of the General Manager and Chief Engineer is commensurate with her new position." In this phrase, the parties did not state that Vista would 'increase' or 'change [upward]' Hofherr's salary if either triggering event occurred. Rather, the parties used the word "changed," a word whose plain and ordinary meaning indicates that Hofherr' s salary could be either increased or decreased as appropriate to the triggering event. Indeed, the parties' use of words requiring Vista to either increase or decrease Hofherr's salary as is commensurate with her new duties serves only to confirm that the last sentence of Paragraph 3.1 is not reasonably susceptible to Hofherr's proposed interpretation.

I need not speculate whether Hofherr, in shifting her employment status from provisional to permanent, would have knowingly agreed that Vista could decrease her salary if her duties were reduced. She signed the employment agreement in which she agreed that her salary could be changed, agreed that her reclassification would trigger Vista's obligation to change her salary, and agreed that reclassification included the expansion or reduction of duties and responsibilities. Hofherr did not enter into an agreement "giving her no job security." Pursuant to the undisputed terms of the employment agreement, she could only be terminated for good cause. Although Vista could reduce Hofherr' s duties and salary, it could not unilaterally and drastically reduce her duties if such reduction amounted to a constructive discharge without good cause.

Accordingly, as the last sentence of Paragraph 3.1 is not reasonably susceptible to the interpretation proposed by Hofherr, I respectfully dissent from Part I, and would affirm the district court's grant of summary judgment dismissing Hofherr's claim for breach of contract.

FILED
JUL 28, 1997
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
By //s// Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRENDA HOFHERR,	) CASE NO. 96CV182 BTM (RBB)
	)
Plaintiff,	) **ORDER GRANTING IN PART**
v.	) **AND DENYING IN PART**
VISTA IRRIGATION	) **DEFENDANTS' MOTION FOR**
DISTRICT; JOHN	) **SUMMARY JUDGMENT OR,**
AMODEO; and DOES	) **IN THE ALTERNATIVE, FOR**
I through X, inclusive,	) **PARTIAL SUMMARY**
Defendants.	) **JUDGMENT AND SETTING**
	) **STATUS AND PRETRIAL**
	) **CONFERENCE DATES**
	) **ON CALENDAR**

I. INTRODUCTION

Plaintiff Brenda Hofherr brings this action against the Vista Irrigation District ('VID'), John Amodeo, and Does I through X alleging that the Defendants violated her state law and federal constitutional rights when they reclassified her job at VID and cut her pay. Plaintiff claims the Defendants retaliated against her in violation of 42 U.S.C. § 1983 and public policy. She further asserts violations of federal environmental statutes under Section 1983 and tort claims for wrongful termination and breach of the implied covenant of good faith and fair dealing. Defendants move for summary judgment on the basis that all of Plaintifl's claims are meritless.

II. FACTUAL ALLEGATIONS

Vista Irrigation District ('VID") hired Plaintiff Brenda Hofherr in November 1991 as its first Director of Safety and Training. At the time of Plaintiff's hiring, VID's General Manager Chief Engineer was Tom Wilson. Plaintiff's duties as Director of Safety and Training included responsibility for all aspects of worker safety and training, workers' compensation administration, and implementation and oversight of environmental compliance procedure. (Pl.'s Compl. ¶ 12.) Prior to January 1995 and the events which precipitated her demotion, Plaintiff received regular advancement, salary increases, commendations, increased responsibility, and assurance that her employment was secure. (Pl.'s Compl. ¶ 11.) On or about May 12, 1995, Plaintiff was formally demoted to Safety Manager.

In February 1994, a salary consultant performed a review of VID positions and determined that the position of Director of Safety and Training was over-classified. The defendants suggest that nothing was done at that time to reclassify the position since Wilson was on the verge of retirement. (Def.'s Mem. P. & A. Supp. Summ. J. at 3.) Wilson's successor, Defendant John Amodeo, was present at the consultant's meeting and claims that from that point on, he was determined to reclassify Plaintiff's job downward. (Id.) When Amodeo became General Manager in the summer of 1994, he developed an "action plan" for VID which included reclassifying Plaintiff's position as had been recommended by the consultant. Amodeo claims he made his final reorganization decisions in December 1994 after discussing the proposed changes with upper-level VID management. However, he claims no specific changes were to occur until VID hired an Assistant General Manager.(Def.'s Mem. P. & A. Supp. Sum. J. at 4.)

Plaintiff alleges that her demotion and pay cut resulted from her actions regarding a site assessment report of Lake Henshaw. She claims her relationship with Defendant Amodeo changed in January 1995 when she met with him to report that recent water samples taken from Lake Henshaw revealed benzene. (Hofherr Decl. ¶ 5.) Plaintiff was concerned because Lake Henshaw provides drinking water to North County residents, and benzene is a known carcinogen. (Pl's Opp'n at 6.) Plaintiff alleges that Amodeo told her that VID should pump out the contaminated water and refill the wells with

fresh water before the next samples were taken. Hofherr claims she was shocked at Amodeo's suggestion and told him that it would be illegal. (Hofherr Decl. ¶ 6.) Amodeo later claimed that he was only joking.[1]

On January 18, 1995, Hofherr attended a staff meeting with Amodeo and other high-level VID personnel to discuss the Lake Henshaw report. Hofherr supported the consultant's recommendation of further site assessment to determine how far the benzene had traveled. Plaintiff claims Amodeo and the other personnel present were interested only in minimizing the results to avoid the cost of further testing or remediation. (Hofherr Decl. ¶ 7.)

On January 19, 1995, Plaintiff claims Defendant Amodeo informed her that she was being reclassified but that he would not cut her pay. (Hofherr Decl. ¶ 8.) The next day Amodeo decided that no reclassification would occur until a new Assistant General Manager was hired. (Def.'s Mem. P. & A. Supp. Summ. J. at 4) Plaintiff claims that changes nonetheless began to occur, such as having her parking space and secretarial support taken away and files moved from her office.[2] (Hofherr Decl. ¶ 9.)

On March 27, 1995, Plaintiff sent a confidential memo to Amodeo informing him that she had reported to the County that there might be an attempt to tamper with the Henshaw monitoring wells. She claims she sent this memo to encourage Amodeo to retract his stated intentions and to help Amodeo get on track with appropriate testing and remediation. In Amodeo's response, dated March 28, 1995, Amodeo claimed that any comments he had made about unlawful acts regarding the cleanup of the site were made in jest. Plaintiff

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1 Although Amodeo denies making this statement to Hofherr, or even meeting with her on that day, Defendants have assumed that the statement occurred as alleged for purposes of this motion. (See Def.'s Mem. P. & A. Supp. Summ. J. at 4 n.2.)

2 Defendant claims that Plaintiff's secretary accepted a promotion to another department and that plans were made to replace her. Defendant further alleges that the files were moved for convenience reasons to allow Human Resource personnel, as well as Plaintiff, to access them. (Pl.'s Notice of Lodgment, Ex. 7.)

claims that the confidential memo enraged Amodeo and caused him to yell at her and enlist others to make statements about the January 18 meeting in an attempt to "go public." (Hofherr Decl. ¶ 11.) The issue was further discussed at the next VID Board meeting on April 5, 1995.

Plaintiff claims that the above events caused Amodeo to demote her and cut her pay. On May 5. 1995, Amodeo sent Hofherr a memo stating that her demotion would take effect on May 12 and would include a pay cut of approximately $14,000 per year. (Hofherr Decl. ¶4 13.) Hofherr responded on May 26,1995, with a memo outlining how she felt she was being treated unfairly because of her efforts to notify VID about her concerns about Amodeo's statements. She also asked Amodeo to reconsider her demotion. (Pl.'s Notice of Lodgment, Ex. 4.) Amodeo immediately scheduled a meeting with all of VID's high-level managers to discuss Hofherr's concerns. The managers could find no corroboration for Hofherr's complaints. (Def.'s Mem. P. & A. Supp. Summ. J. at 6.)

Since Defendant did not respond immediately to her memo, Plaintiff resigned and accepted employment at Hallmark Circuits, Inc. as their Environmental, Health and Safety Manager. (Hofherr Decl. ¶ 16.) Defendant claims that he was shocked and surprised at Plaintiff's resignation and that he asked to meet with her to reconsider her decision. (Pl.'s Notice of Lodgment, Ex. 6.) Plaintiff declined to do so and went to work at Hallmark Circuits. Six months later Hofherr resigned from Hallmark Circuits when the job turned out to be less than promised. (Hofherr Decl. ¶18.) She subsequently filed this lawsuit.

III. DISCUSSION

A. Standard of Review

Summary judgment is properly granted when "there is no genuine issue as to any material fact and. . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett. 477 U.S. 317, 322 (1986).

The court shall consider all admissible affidavits and supplemental documents submitted on a motion for summary judgment. See Connick v. Teacher Ins. & Annuity Ass'n, 784 F.2d 1018, 1020 (9th Cir. 1986).

To defeat a summary judgment motion, the nonmoving party must come forward with evidence "sufficient to establish the existence of any elements that are essential to that party's case, and for which that party will bear the burden of proof at trial." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (citing Celotex, 477 U.S. at 322). The party opposing summary judgment cannot rest on conclusory allegations but must set forth specific facts showing that there is a genuine issue for trial. Leer v. Murphy, 844 F.2d 628, 631 (9th Cir. 1988).

B. Interpretation of Plaintiff's Employment Agreement

Plaintiff bases her claims on the contract she entered into with Tom Wilson. She suggests that it incorporated all of the Vista Irrigation Supervisors' Association ("VISA") Memorandum of Agreement. Article 9.5 of the VISA Agreement provides that:

> When an employee's present job description is rewritten to reduce duties and responsibilities, an incumbent employee shall remain at his current pay rate even if the current pay rate is in excess of the top step for the reduced classification. Employees whose positions are reduced as a result of a reclassification shall remain at their current pay rate until such time as that pay rate is met or exceeded by the rate of pay for the lower classification due to subsequent overall adjustments of all District salary ranges.

Wilson has stated that as General Manager of VID he intended that the District follow and be bound by the VISA rules for reclassification and that the District should not have the power or right to reclassify Plaintiff downward and reduce her pay. (Wilson Decl. ¶¶ 8,11.)

Defendants argue that Plaintiff's contract was not bound by the VISA Agreement since it nowhere incorporates the entire VISA

Agreement. Instead, in paragraph 3.1[3] it references paragraph 9.1 of the VISA Memorandum of Agreement, which deals with base salary adjustments only.[4] The contract also specifically states that:

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3. Paragraph 3.1 provides in full:

> 3.1 Base Salary Effective November 12,1992, District shall pay Kuetzing [Hofherr's maiden name] a base salary equivalent to Range/Step Salary Schedule D-6-1/D, payable in biweekly installments. Effective January 1, 1993, Kuetzing's salary will be adjusted utilizing applicable formula as established and defined by Memorandum of Agreement, Article 9.1, Salaries, entered into between District and the Vista Irrigation Supervisors' Association (VISA) for Calendar Years 1993 through 1995. A copy of that Memorandum is attached hereto as Exhibit "B" and is made a part hereof. Also, in the event no new Agreement is negotiated, Kuetzing's base salary shall be adjusted in accordance with the Memorandum of Agreement to be negotiated between the District and VISA for successor years. Should Kuetzing be promoted to a higher position or her present position be reclassified at the discretion of the General Manager and Chief Engineer, then her Base Salary shall be changed to an amount which in the sole discretion of the General Manager and Chief Engineer is commensurate with her new position.

(Pl.'s Notice of Lodgment, Ex. 2.)

4 Section 9.1 of the VISA Agreement provides in full:

> 9.1. Salaries
>
> 9.1.1 Salaries Effective for Calendar Years 1992 through1995
>
> 1. 1992: For the first year of this contract effective January ,1992, or upon executi[on] of this agreement, whichever is later, salaries for VISA members, will be increased by 4%.
>
> 2. 1993: For calendar year beginning January 1,1993, VISA member salaries will be calculated based on the following formula:
>
> The formula will utilize the 12-month Consumer Price Index ending October 31, 1992, for Los Angeles, All Wage Earners. If the CPI percentage increase falls within the range of 4% to 6%, then the actual percentage rounded to the nearest one-tenth will be given as the increase. If the CPI percentage falls above or below the range, then the salary percentage increase would be the maximum or minimum of the range, whichever applicable, plus or minus 50% of the difference to the actual.

> Should [Hofherr] be promoted to a higher position or her present position be reclassified at the discretion of the General Manager and Chief Engineer, then her Base Salary shall be changed to an amount which in the sole discretion of the General Manager and Chief Engineer is commensurate with her new position.
> (Pl.'s Notice of Lodgment, Ex. 2 ¶ 3.1.)

Under California law, contracts are to be interpreted to give effect to the mutual intention of the parties at the time of contracting. Cal. Civ. Code § 1638; Waller v. Truck Ins. Exchange, 44 Cal. Rptr. 2d 370, 378 (1995). As the California Supreme Court has held, "[s]uch intent is to be inferred, if possible, solely from the written provisions of the contract, [Cal. Civ. Code] § 1639," read in their ordinary and

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> . . .
> . . .
> . . .
> 9.1.2 Salary Range-Step System
>
> A system of salary ranges with five steps has been established. A newly hired employee, unless given credit for specific prior experience, will begin at Step A of the salary range assigned to his job description. At six months he moves to Step B, at eighteen months to Step C, at thirty months to Step D, and at to forty-two months to Step E. Salary Ranges will generally change only with cost-of-living increases.
>
> Prior to advancing to the next highest step, the employee must receive an Employee Performance Evaluation, approved by the General Manager, recommending advancement to the next step. An employee not recommended for advancement will remain at his present step. If such an employee is subsequently advanced to the next step, his date for eligibility to the next higher step shall be twelve (12) months from the date he entered his new step (i.e., employee on Step B is not recommended to Step C; however, he improved his performance and is subsequently advanced to Step C. His eligibility date for advancement to Step D shall be twelve (12) months from the date he entered Step C).
>
> (Pl.'s Notice of Lodgment, Ex. 3.)

popular sense, unless it appears the parties used the terms in some special sense. AIU Ins. Co. v. FMC Corp., 274 Cal. Rptr. 2d 820, 831 (1995). Thus, "if the meaning a layperson would ascribe to contract language is not ambiguous, [the court should] apply that meaning." Id. Since Plaintiff has offered no extrinsic evidence to help construe the written agreement, the Court finds that the contract is not ambiguous. The VISA Agreement was not incorporated wholesale into the contract, and the General Manager had the discretion to set an appropriate compensation upon reclassification of her position.

C. 42 U.S.C. § 1983 Claims

Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. 42 U.S.C. § 1983; Parrat v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327, 328 (1986); Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc). Here, it appears that defendant Amodeo, an employee of the County of San Diego, acted under color of state law in his official capacity at VID. Thus, the issue is whether Defendants deprived Plaintiff of any constitutional rights.

Plaintiff grounds her federal claims in a number of different theories, including environmental, due process, and First Amendment violations. Defendants argue that Plaintiff either has failed to state a cause of action under 42 U.S.C. § 1983 or has failed to provide evidence sufficient to raise a genuine issue of material fact on the merits of her claims.

1. Environmental Violation Claims

Hofherr's first cause of action under 42 U.S.C. § 1983 is based upon an alleged violation of rights under the Solid Waste Disposal Act ("RCRA"), the Safe Drinking Water Act ("SDWA") and the Comprehensive Environmental Response, Compliance, and Liability Act ("CERCLA"). Plaintiff claims she was retaliated against for her activities in furtherance of the purposes and enforcement of these Acts designed to prevent discharge of hazardous and toxic material into drinking water supplies.

The Court finds that Defendants are entitled to summary judgment on this claim. Plaintiff may not pursue her Section 1983 claim unless Congress intended to preserve a right of action under Section 1983 to redress RCRA, SDWA, or CERCLA violations. See, e.g., Mattoon v. City of Pittsfield, 980 F.2d 1, 5 (1st Cir. 1992). In Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981), the Supreme Court wrote that when the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 19832 The Court further stated that "the existence of. . . express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under Section 1983." Id. at 21. Comprehensive federal statutory schemes, such as the SDWA, preclude rights of action under Section 1983 for alleged deprivations of constitutional rights in the field occupied by the federal statutory scheme. Smith v. Robinson, 468 U.S. 992, 1003 (1984). The SDWA as a whole is sufficiently comprehensive to preclude federal common law remedies. Mehrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996).

As the Court further explained in Mehrig, "where Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute." Mehrig, 116 S. Ct. at 1256. Thus, the Court finds that Plaintiff may not state a claim under Section 1983 for violation of any of the stated federal environmental statutes. Summary judgment is GRANTED for Defendants on this claim.

2. Due Process Claim

Plaintiff claims that her prior experience working at VID and the fact that her contract incorporated the VISA agreement created a promise of continued employment as VID Director of Safety and Training. Plaintiff alleges that the job reclassification violated her due process rights. Defendants contend that Plaintiffs contract specifically allowed for her reclassification and pay cut at the General Manager's discretion.

Under the Due Process Clause, for the procedural rights of Plaintiff to have been violated, she must have possessed a property interest as contemplated by the Fourteenth Amendment. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). To have a property interest in government employment, an employee must demonstrate an entitlement to the job. Roth v. Veteran's Admin., 856 F.2d 1401,1409 (9th Cir. 1988). Entitlement arises from rules or understandings from independent sources, such as statutes, regulations, and ordinances, or express or implied contracts. Roth, 408 U.S. at 577. The Supreme Court has held that an employee could have a property interest in his job if he had an expectation of continued employment. Id.

In this case, it appears that Plaintiff was not denied due process. The contract entered into with VID specifically provided that Plaintiff could be redassifled at the General Manager's discretion. See supra part Ill, section B. Since that was clearly stated in her contract, Plaintiff cannot state a due process violation for her reclassification. Furthermore, Plaintiffs employment was not terminated. She was demoted from Director of Safety and Training to Director of Safety and subsequently chose to resign and take employment elsewhere. These factors do not suffice to establish a due process claim. Accordingly, summary judgment is GRANTED for Defendants on this claim.

3. First Amendment Claim

Plaintiff claims Defendant Amodeo's acts violated her First Amendment rights to association and free speech. She claims her reclassification and pay cut were punitive actions taken by Amodeo in retaliation for the embarrassment she caused him about his Lake Henshaw contamination comments. Defendant claims that his decision to reclassify Plaintiff was justified since he made it in December *1994,* pnor to the Lake Henshaw report.

Although an employment transfer may not be a sufficient deprivation of property to trigger due process protection, it can be enough to state a First Amendment retaliation claim. See Rutan v. Republican Party of Ill., 497 U.S. 62, 72 (1990) (holding that adverse promotion, transfer, and hiring decisions based on exercise of First Amendment rights are actionable). The relevant inquiry in this case

is whether the speech in question was constitutionally protected from retaliation by the government acting in its capacity as an employer/supervisor. Hyland v. Wonder, 972 F.2d 1129, 1136 (9th Cir. 1992). The First Amendment protects a government employee's speech if it is on a matter of public concern and the employee's interest in expressing herself on this matter is not outweighed by any injury the speech could cause to the government's interest, as an employer, in promoting the efficiency of the public services it performs through its employees. Connick v. Myers, 461 U.S. 138, 142 (1983).

Determining whether speech involves a matter of public concern entails an inquiry into the "content, form, and context of a given statement, as revealed by the whole record." Id. at 147-148. If some part of the communication addresses an issue of public concern, the First Amendments protections are triggered. Id. In Roth v. Veteran's Admin., 856 F.2d 1401 (9th Cir. 1988), the court observed that speech regarding the "misuse of public funds, wastefulness, and inefficiency in managing and operating government entities qualifies as a matter of public concern. Id. at 1405. Similarly, in Allen v. Scribner, 812 F.2d 426 (9th Cir.1987), the court held that speech criticizing the "competency of (the Mediterranean Fruit Fly Eradication] Project Management as well as the efficient performance of project duties' constituted a matter of public concern. Id. at 431.

Viewing the alleged facts in the light most favorable to Plaintiff, it is clear that Hofherr's comments and memorandum discussed a matter of public concern. Plaintiff believed that Defendant Amodeo intended to tamper or interfere with test results and remediation efforts regarding a contaminated ground water site. Soon after Plaintiff informed Defendant that she had relayed her concerns about Amodeo to the County and VID Board, she was demoted. See Schwartzman v. Valenzuela, 846 F. 2d 1209, 1212 (9th Cir. 1988) (court should consider proximity in time between protected action and allegedly retaliatory employment decision.) From the given facts, a jury could determine that Plaintiff had a First Amendment right to freely communicate her concerns to the County and VID Board without retaliation. Plaintiff has, therefore, presented a genuine issue of fact concerning the question whether her speech and memorandum were a substantial factor in her demotion. Thus, the motion for

summary judgment is DENIED on this claim.

D. State Claims

In Foley v. Interactive Data Corp., 47 Cal. 3d 654, 662 (1980), the California Supreme Court described three theories under which a wrongful termination action may be brought (1) a tort cause of action for discharge in violation of public policy; (2) a contract cause of action for a breach of an express or implied-in-fact agreement to discharge for good cause only; and (3) a cause of action for breach of the implied-in-law covenant of good faith and fair dealing. Plaintiff alleges all three theories, and the Court considers each in turn.

1. Wrongful Retaliation, Demotion, and Termination in Violation of Public Policy

Plaintiff's second cause of action alleges wrongful retaliation, demotion, and termination in violation of public policy against all Defendants. Plaintiff claims that the purpose behind the wrongful and retaliatory demotion, and the accompanying losses of status, responsibility, compensation, support, and future job security violates the public policies of the State of California, which includes protecting disclosures of unlawful activity and violation of law to government agencies. Plaintiff further alleges that as a result of the wrongful conduct of Defendants, Plaintiff has suffered and continues to suffer harm, including substantial losses in earnings, bonuses, and deferred compensation, humiliation, embarrassment and mental anguish.

California courts have recognized a public policy exception to the at-will employment doctrine since Tameny v Atlantic Richfield Co., 27 Cal. 3d 167 (1980). In Foley, the court noted that the policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer. Foley, 47 Cal. 3d at 669. According to Gantty Sentry Insurance, 1 Cal. 4th 1083, 1093 (1992), "[t]he term 'public policy' is inherently not subject to precise definition. . . By 'public policy' it is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good . . ..

Viewing the evidence in the light most favorable to the Plaintiff, a jury could find that Defendants retaliated against Plaintiff because she disclosed Defendant Amodeo's Lake Henshaw comments. According to Plaintiff, Amodeo's comments concerned Plaintiff that he was going to tamper with the water samples taken from Lake Henshaw in an attempt to conceal the benzene. If Amodeo intended to do so, his conduct would be unlawful. Since Amodeo did not notify Plaintiff of his intent to cut her pay until May 5, 1995, which was after he received her memo informing him that she had reported his comments to the County (March 27,1995) and after she had reported his comments to the VID Board (April 5,1995), a jury could find a causal connection between the events and Plaintiff's demotion, indicating retaliation. Accordingly, if Plaintiff was demoted for disclosing potentially unlawful and injurious activity, that would be a violation of public policy. However, for the reasons set forth below, Plaintiff has no claim for wrongful discharge as there was no constructive termination.

Defendants' allege that California Govemment Code section 820.2 bars Plaintiffs public policy claim on the basis of immunity. Government officials are immune from tort liability for personnel decisions if the decision involved organizational planning. Caldwell v. Montova,14 Cal. 4th 972, 981 (1995). However, Plaintiff claims that Amodeo's decision to reclassify her position and cut her pay was not the result of organizational planning, but a retaliation for her comments and memorandum to the Board about him. Viewing the alleged facts in the light most favorable to Plaintiff, it appears that Plaintiff has established a genuine issue of material fact as to the reason behind her demotion. Therefore, Defendants' motion for summary judgment on this claim is DENIED in part and GRANTED in part.

2. Breach of Employment Agreement Claim

Plaintiff's third cause of action alleges that VID breached her contract by demoting her and cutting her pay. Plaintiff claims that her employment agreement was partly written, partly oral, and partly implied. Plaintiff claims that during her employment she performed all of the duties, obligations, and responsibilities of her employment agreement. She also alleges that the contract expressly incorporated

the VISA Memorandum of Agreement, and second, that VID impliedly promised Plaintiff that as long as she performed her job satisfactorily her employment would continue. Plaintiff alleges that Defendants breached the employment agreement by demoting her, thereby making the conditions of Plaintiff's employment so intolerable that she was constructively terminated without good cause.

"Constructive termination or discharge" results when working conditions are made so intolerable by the employer that the wronged employee is forced to quit. Lee v. Bank of America Nat'l Trust & Say. Assoc., 27 Cal. App. 4th 197, 213 (1994). That is, constructive termination occurs when... a reasonable person in the employee's position would have resigned." Id. (quoting Hunter v. Up-Right, Inc., 6 Cal. 4th 1174, 1196 (1993) (dis. opn. of Kennard, J.)). There must be some element of intolerability which makes an otherwise voluntary act, such as resignation, a de facto involuntary one. Id.

To survive a motion for summary judgment, Plaintiff must raise a genuine issue of material fact that the employment agreement was breached by conduct of defendants constituting constructive discharge. Soules v. Cadam Inc., 2 Cal. App. 4th 390, 399 (1992). "Whether conditions were so intolerable as to justify a reasonable employee's decision is usually a question of fact Situations may exist, however, where the employee's decision to resign is unreasonable as a matter of law. Valdez v. City of Los Angeles, 231 Cal. App. 3d 1043, 1056 (1991). The instant case presents such a situation.

The allegedly intolerable working conditions which forced Plaintiff to resign consisted of her demotion from Director of Safety and Training to Director of Safety. She also claims that Defendant Amodeo pounded on her door in a fit of rage after receiving her memo to VID about his Lake Henshaw comments. It has been established that this is not enough to state a claim for constructive discharge. A demotion of a job level, even when accompanied by reduction in pay, does not constitute constructive discharge. Soules, 2 Cal. App. 4th at 401; Wagner v. Sanders Assoc., Inc., 638 F. Supp. 742, 745 (C.D7Cal. 1986).

Since Plaintiff's contract specifically states that the General Manager could reclassify her position and adjust her salary at his

discretion, and the Court has rejected Plaintiff's claim that her contract is governed by the VISA Agreement, Plaintiff has not established a cause of action for breach of an express employment agreement. Nor has Plaintiff made out a claim for breach of implied contract, since her demotion did not rise to the level of intolerable" working conditions that would constitute "constructive discharge". Soules, 2 Cal. App. at 401. Thus this Court finds Plaintiff's claim for breach of the employment agreement without merit. Summary judgment is GRANTED for Defendants on this claim.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiff's fourth cause of action alleges that her employment agreement with Defendant VID contained an implied covenant of good faith and fair dealing by which VID promised to give full cooperation to Plaintiff in her employment. Specifically, Plaintiff claims that Defendant was required to perform the terms and conditions of the employment agreement fairly, honestly, and reasonably and to refrain from conduct which would deprive Plaintiff from her benefits under the employment agreement. Plaintiff claims that Defendants demoted her without good cause or reason.

Cleary v. American Airlines Inc., 111 Cal. App. 3d 443 (1980), established a cause of action for wrongful discharge based upon breach of the implied covenant of good faith and fair dealing when two factors were present: (1) longevity of employment and (2) an express policy of the employer in providing specific procedures for adjudicating employee disputes. Id. at 15 456. Three years employment is not enough to establish longevity, see Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 478 *(1984)*, and second, Plaintiff has made no showing of an express VID policy providing specific procedures for an employee dispute such as Plaintiffs. Thus, this Court finds no evidence of either Cleary factor.

Cleary establishes only one manner among many by which an employer might violate this covenant Khanna v. Microdata Corn.. 170 Cal. App. 3d 250, 259 (1985). A breach of the implied covenant of good faith and fair dealing in employment contracts is also established whenever the employer engages in 'bad faith action extraneous to the contract, combined with the obligor's intent to

frustrate the (employee's] enjoyment of contract rights." Id. at 262 (quoting Shapiro, 152 Cal. App. 3d at 479). Plaintiff has not alleged facts sufficient to show a bad faith act by [VID] which was extraneous to the employment relationship and which was intended to frustrate [her] enjoyment of contractual rights." Shapiro, 152 Cal. App. 3d at 478. Plaintiff has only alleged in broad fashion that her contract incorporated the VISA Agreement which forbade a pay cut. As the Court has found, see supra part III, Section B, the contract only incorporates one part of the VISA agreement (Article 9.1), which deals with base salary adjustments only.

Since Plaintiff has not put forth evidence sufficient to establish a cause of action for breach of the implied covenant of good faith and fair dealing under the standards set forth in Cleary, nor under the definition set forth in Shapiro, summary judgment is GRANTED for Defendants on this claim.

Defendant Amodeo contends that he cannot be held liable on Plaintiff's claim for wrongful demotion or termination. The Court has found that Plaintiff has failed to establish a claim for wrongful termination in violation of the contract or public policy as Plaintiff resigned and there was no constructive termination. Therefore, the Court need not decide whether Amodeo can be liable for wrongful termination. The only remaining state claim is for wrongful retaliation and demotion Whether Amodeo can be held liable on such a claim has not been adequately briefed and appears to be an open question. Plaintiff relies on Roberts v. Ford Aerospace and Com. Corp., 224 Cal. App. 3d 793 (1991). However, Roberts dealt with liability under California Government Code Sections 12920 and 12940 and is therefore inapplicable. The Defendant relies on Weinbaum v. Goldfarb, Whitman & Cohen, 46 Cal. App. 4th 1313 (1996). In that case, however, the court held that a third party not even employed by the employer could not be held liable on a wrongful discharge as against public policy claim. Amodeo was Plaintiff's supervisor and not a mere third party. Neither party has cited any case on point.

The Court need not reach this issue at this time as the case will clearly proceed to trial against Amodeo on the Section 1983 claim. The parties may brief this issue further in advance of trial and readdress it on further motion under either Rule 50 or 56.

IV. CONCLUSION

For the reasons set forth above, the Court GRANTS in part and DENIES in part the Defendants' motion for summary judgment.

As to the first cause of action for violation of 42 U.S.C. § 1983,
(a) Defendants' motion for summary judgment as to Plaintiff's environmental violation claim is GRANTED.
(b) Defendants' motion for summary judgment as to Plaintiff's due process claim is GRANTED.
(c) Defendants' motion for summary judgment as to Plaintiff's First Amendment claim is DENIED.

As to the second cause of action for wrongful retaliation and demotion in violation of public policy, Defendants' motion for summary judgment is DENIED. As to the second cause of action for wrongful discharge in violation of public policy, Defendants' motion for summary judgment is GRANTED.

As to the third cause of action for breach of employment agreement, Defendants' motion for summary judgment is GRANTED.

As to the fourth cause of action for breach of the implied covenant of good faith and fair dealing, Defendants' motion for summary judgment is GRANTED.

The Plaintiff alternatively seeks summary adjudication in her memorandum in opposition to Defendants' motion. Plaintiff did not properly notice an actual motion for summary adjudication. Additionally, disputes of material fact clearly exist as to the remaining claims. Therefore, Plaintiff's motion in the altemative for summary adjudication is DENIED.

The Court sets a pretrial conference on calendar for August 28, 1997 at 4:00 pm in Courtroom 15 of the United States Courthouse, San Diego, California. The Court shall also hold a status conference on July 31,1997 at 4:00 pm to discuss the form of the pretrial order.

IT IS SO ORDERED.
Dated: July 24, 1997

//s//
HONORABLE BARRY TED MOSKOWITZ
United States District Judge

Copies to:
HONORABLE RUBEN B. BROOKS
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES AND COUNSEL OF RECORD

FILED JAN - 8, 1998
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY /h// DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRENDA HOFHERR. plaintiff,	)	CASE NO. 96-CV-0182-BTM (RBB)
vs.	)	**ORDER GRANTING IN PART AND**
VISTA IRRIGATION DISTRICT, et al.,	)	**DENYING IN PART DEFENDANTS' AND PLAINTIFF'S MOTIONS IN**
defendants.	)	**LIMINE.**
	)	

INTRODUCTION

Plaintiff brought this suit against her former employer under § 1983 and California common law alleging that she was wrongfully demoted and discharged. In an Order dated July 28, 1997, this Court granted partial summary judgment in favor of defendants. See Hofherr v. Vista Irrigation District, Case No. 96-CV-0182 (Order Granting In Part and Denying in Part Defendants' Motion For Summary Judgement). In this Order, the Court held that plaintiff has no claim for wrongful discharge and that there was no constructive termination. See id. at 12 ("Plaintiff has no claim for wrongful discharge as there was no constructive termination."); id. at 15 ("the only remaining state claim is for wrongful demotion"). The Only remaining claims following the Court's July 28 Order are plaintiff's § 1983 claim for wrongful demotion in violation of the First Amendment, see id. at 10, and her state law claim for wrongful demotion in violation of public policy, see id. at 12.

DEFENDANTS' MOTIONS IN LIMINE

Defendants now seek to exclude certain evidence at trial, and bring two motions in limine. First, defendants seek to exclude evidence of plaintiff's resignation and subsequent events, including damages she allegedly suffered after quitting her job. Second, defendants wish to bifurcate the trial. Defendants move that the first

phase of the trial be restricted to liability and actual damages, and that evidence of defendants' wealth be excluded from this phase. If liability and sufficient malice are found in the first phase, the second phase of the trial would adjudicate the issue of punitive damages. Only in the second phase would evidence off defendants' wealth be permitted. For the reasons stated below, the Court grants both of defendants' motions in limine.

I. Motion To Exclude Evidence Of Plaintiff's Resignation And Subsequent Events

Defendants move the Court to exclude evidence of plaintiff's resignation, and subsequent events, including damages she allegedly suffered after she quit her job. Plaintiffs contend that such evidence should be permitted to prove consequential damages that accrued when she quit her job. Plaintiff's contention seems to be that she was required to mitigate her damages, and that defendant should be 'liable for consequential damages resulting from the victim's reasonable attempts to mitigate because the plaintiff would not have been forced to mitigate at all but for the original unlawful acts of the tortfeasor." (Plaintiff's motion in limine at 2) Plaintiff's argument turns the concept of mitigation on its head,[1] and is in the end, unavailing.

This Court has already held that plaintiff was not fired. Nor was she constructively discharged. She quit. This suit now concerns only the claims that plaintiff was wrongfully demoted, and the only decision that remains to be tested is defendants' decision to reclassify plaintiff's position. By introducing evidence of post-quit damages, plaintiff essentially seeks to recover the same damages that would be available had she been wrongfully terminated.

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1 Implicit in this argument is the assertion that by mitigating her damages, plaintiff suffered additional injury. This argument is alien to the mitigation doctrine, which requires a plaintiff to avoid those damages that can be reasonably averted. The argument that damages accrued from plaintiff's efforts to mitigate (reduce) her damages is novel, yet unconvincing.

The fact remains, however, that as a matter of law, she was not wrongfully terminated or constructively discharged. Plaintiff should not, therefore be able to prove or collect damages as if she were.

As far as the Court is aware, only one court has squarely addressed the question of whether an employee who was neither terminated nor constructively discharged may collect post-quit damages. In Rochlis v. Walt Disney Co., *19* Cal. App. 4th 201 (1993), the court held that damages other than pre-quit damages (i.e. unpaid salary, or other benefits) cannot be recovered in the absence of evidence that the employer has discharged the employee. Applied to this case, it means that Hofherr has no basis for recovering [post-quit damages] unless there has been a constructive discharge.

Rochlis involved contract claims, whereas plaintiff's remaining claims in this action sound in tort. Nonetheless, this Court finds the Rochlis court's reasoning persuasive, and hereby adopts it in this context.

Whether a claim arises in contract or tort, a plaintiff cannot collect damages which were not proximately caused by the allegedly wrongful acts of defendants. Here, the Court has found that plaintiff was not terminated nor constructively discharged. Consequently, defendants did not cause her to quit her job. Any damages that flow from her resignation were proximately caused by her decision to resign, not by defendants decision to demote her, which is the only act the legality of which remains to be tested. Such damages are not recoverable, and any proof of them is therefore irrelevant. The introduction of such proof would only waste time and confuse the issues, and would in addition create a substantial danger of prejudice that would far outweigh any possible probative value. Defendants' motion is therefore GRANTED. IT IS ORDERED that plaintiff shall not be allowed to present proof of any damages arising out of her loss of employment after she resigned from defendants' employ, including emotional distress. Whether or not the fact of plaintiffs resignation is relevant and admissible shall be decided on an appropriate record at trial.

II. Motion To Bifurcate Trial And Exclude Evidence Of Wealth

Defendants move this Court to bifurcate the trial into a liability phase and a damages phase. Defendants main concern seems to be the possible prejudicial effect of defendants' wealth. Plaintiffs do not object to an order bifurcating the punitive damages issue. (Plaintiffs motion in limine at 1)

Under Rule 42(b), the court may "order a separate trial of ... any issue" in furtherance of convenience or to avoid prejudice. Fed. R. Civ. *Proc.* 42(b). The Court finds that bifurcation of the punitive damages issue will avoid prejudice to the defendants by withholding evidence of their wealth until after liability is determined, and will facilitate efficient disposition of the issues. See Arnold v. United Artists Theater Circuit, Inc., 158 F.R.D. 439, 459 (N.D. Cal. 1994). Therefore, IT IS HEREBY ORDERED that the trial will proceed first on the issue of substantive liability and actual damages. If in the first phase, the jury finds for plaintiff, a second phase will commence, wherein the trier of fact will determine liability for and the extent of punitive damages to be awarded.

The Court denies without prejudice the defendants' motion to exclude evidence of the wealth of Vista Irrigation District at the time of the alleged tests. The Court has an insufficient evidentiary record to decide this issue. Plaintiff, however, shall not present or mention this evidence unless she first brings it up to the Court for a ruling as to admissibility.

PLAINTIFF'S MOTIONS IN LIMINE

Plaintiff moves to allow evidence of post resignation damages. For the reasons set forth above, this motion is DENIED.

Plaintiff also seeks to exclude evidence about the Lake Henshaw site. However, this evidence has a very high probative value that substantially outweighs any possible prejudice or confusion. This evidence is admissible on the issue of defendants' intent in demoting plaintiff and whether plaintiff had a reasonable, good-faith belief that defendants were considering doing something illegal. The evidence is further admissible to offer an explanation of the alleged remark by Mr. Amodeo. Therefore, the Court finds that the evidence is admissible under Fed. R. Evid. 403. Plaintiffs motion on this issue is

DENIED.

Finally, plaintiff moves to preclude defendants from raising a defense of mitigation of damages. Defendants have stated they do not intend to raise this defense. Defendants's therefore, shall not present any evidence indicating that plaintiff failed to mitigate damage.

CONCLUSION

For the reasons set forth above, plaintiff's motions in limine are granted in part so as to preclude defendants from raising the defense of mitigation of damages only. Plaintiff's motions in limine are denied in all other respects. Defendants' motions in limine with respect to plaintiffs post-resignation damages is granted, as is defendants' motion to bifurcate the trial. The defendants' motion to exclude evidence of Vista Irrigation District's wealth at the time of the tests is denied without prejudice.

IT IS SO ORDERED.
DATED: January 6, 1998

//s//
HONORABLE BARRY TED MOSKOWITZ
United States District Judge

Copies To:
Counsel of Record
Magistrate Judge Brooks

Supreme Court, U.S.
FILED
SEP 29 2000
CLERK

(2)

No. 00-331

IN THE

Supreme Court of the United States

BRENDA HOFHERR,

Petitioner,

v.

VISTA IRRIGATION DISTRICT, JOHN AMODEO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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17 pp

QUESTIONS PRESENTED FOR REVIEW

Is an employee who has been subjected to wrongful retaliation and demotion in violation of public policy, breach of written contract of employment and whose Constitutional rights have been violated under color of law in violation of 42 U.S.C. § 1983, entitled to recover provable consequential damages sustained as a result of her reasonable efforts to mitigate her damages by seeking other employment?

Alternatively, if such an employee may not recover damages arising from her reasonable efforts to mitigate her damages by seeking other employment, may she recover the consequential damages she would have sustained but for her reasonable but unsuccessful attempt to mitigate?

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OPINION BELOW

The *unpublished decision* of the United States District Court for the Ninth Circuit dated May 24, 2000 affirmed the findings of the United States District Court for the Southern District of California that Petitioner could not recover post-resignation damages in an action alleging wrongful demotion in violation of public policy and 42 U.S.C. § 1983. The Ninth Circuit held: "The district court ruled that Petitioner was not constructively discharged, a ruling she has not appealed. Accordingly, Petitioner cannot recover any damages incurred subsequent to her resignation." Pet. at 6a.

STATEMENT OF JURISDICTION

Respondents argue herein that the Petition for Writ of Certiorari (hereinafter "Petition") should be summarily denied for lack of jurisdiction inasmuch as the questions presented were not preserved on appeal because Petitioner failed to appeal the District Court's findings that she had not been constructively discharged, an essential factual predicate to recovery of the damages she seeks — post-resignation damages.

INTRODUCTION

Vista Irrigation District (hereinafter "VID") and John Amodeo (hereinafter "Amodeo") (collectively "Respondents") submit this brief opposing the Petition for Writ of Certiorari of Brenda Hofherr (hereinafter "Hofherr") of an *unpublished opinion* of the United States Court of Appeals for the Ninth Circuit. In that opinion, the Ninth Circuit affirmed the District Court's finding that Hofherr

could not recover post-resignation damages because she had not been constructively discharged as a matter of law, a ruling she did not appeal.

STATEMENT OF THE CASE

This is a demotion case arising out of the reclassification of Hofherr's position by VID in May of 1995. VID is a special district governmental agency that supplies the residential, commercial and agricultural water needs for San Diego's north county areas. As a major water supplier to San Diego's north county, VID employs approximately 85 persons and has a publicly elected Board of Directors. VID hired Hofherr in November of 1991 as its first Director of Safety and Training, an exempt and "permanent" position with the District.[1] Hofherr executed an employment agreement effective November 12, 1992 which set forth the terms and conditions of her employment as Director of Safety and Training. At the time of her hiring, VID's General Manager and Chief Engineer was Tom Wilson.

In February 1994, a compensation consultant from a Big Six accounting firm reviewed VID's compensation system and noted that one position was overclassified within the VID organization — the Director of Safety and Training. Mr. Wilson, who was on the verge of retirement, did not act upon that information. When Amodeo, the then-Assistant General Manager, replaced Tom Wilson as VID's General Manager and Chief Engineer in the summer of 1994, he promptly developed an action plan to reorganize VID's

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1. The term "permanent" is a statutorily defined term. Under Cal. Water Code § 21190, employees of water districts are "permanent" employees if they are employed to fill positions that normally require more than six months employment in each year.

reporting relationships into a more functional, common-sense structure. This action plan included, among other restructuring, reclassifying the Director of Safety and Training position downward, as the compensation consultant had recommended. To accomplish the reorganization, Amodeo repeatedly conferred with the Human Resources Manager and other upper-level management and also sounded out his plan with individual members of the Board of Directors. After receiving this input, Amodeo made his final reorganization decisions in December 1994.

As a final step in the reorganization process, Amodeo met with the VID Board of Directors on January 18, 1995 to inform them of the new organizational structure and revised reporting relationships. The topic was a slated item on the Board agenda, which had been posted since, at the latest, January 13, 1995. Following that meeting, on January 19, 1995 Amodeo and other members of management met with Hofherr to advise her that her position, among others, was to be reclassified. In an effort to be supportive and sensitive to Hofherr, they informed her that no specific changes would occur to her position until VID hired an Assistant General Manager, which was to happen within a month or so.[2]

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2. Despite the overwhelming evidence of the district-wide reorganization, Hofherr continues to assert that the events that actually caused her reclassification began on January 13, 1995 (the same day that the Board agenda was posted) when she allegedly met with Amodeo and reported the existence of possible contamination at the Lake Henshaw site. Pet. at 3-4. After this alleged January 13 meeting, however, Hofherr did not say one word to *anyone* at VID about Amodeo's purported "scheme" for more than two months. Then, on March 27, 1995, Hofherr, for some

(Cont'd)

In May 1996, a new Assistant General Manager was finally hired to fill the position vacated by Amodeo, and Hofherr was formally notified on May 5, 1996 of her reclassification to the position of Safety Manager. On that day, Amodeo sent Hofherr a memorandum stating that the reclassification would take effect May 12 and would include a pay cut of approximately $14,000 per year. Amodeo and Hofherr had previously discussed the possibility of not reducing her salary, but VID ultimately decided to reduce her salary under the terms of her employment agreement.[3]

Rather than accept her demotion, Hofherr responded on May 26, 1995 with a memorandum outlining allegedly intolerable working conditions. Before VID or Amodeo could respond, Hofherr notified VID on June 13, 1995 that she was resigning her position effective June 27. All told, Hofherr worked approximately seven weeks at her reduced salary before *she quit*.

The day before she announced her resignation from VID, June 12, 1995, Hofherr accepted a job at Hallmark Circuits, Inc. to be its Environmental Health and Safety Manager. She

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(Cont'd)
unknown reason, abruptly rekindled her supposed concerns and sent a scathing letter to Amodeo accusing him of planning to tamper with the monitoring wells. Pet. at 5. Everyone, especially Amodeo, was stunned, and Amodeo immediately informed the Board of Hofherr's out-of-the-blue allegations. At the next Board meeting, the Board questioned Amodeo and various other employees in detail regarding Hofherr's allegations. After a full hearing, the Board found absolutely no wrongdoing whatsoever.

3. Contrary to Hofherr's assertions, she had not been "promised that her demotion would not include a pay cut." Pet. at 5.

began working there with no break in pay. Six months later, however, she voluntarily resigned from Hallmark Circuits when the job turned out to be less than promised. She subsequently filed this lawsuit.

REASONS FOR DENYING THE WRIT

A. NEITHER THE RECORD NOR THE DECISION BELOW RAISED THE QUESTIONS PRESENTED IN THE PETITION

The Petitioner presented two issues to the Ninth Circuit: (1) whether the District Court erred in granting summary judgment as to Hofherr's cause of action for breach of contract; and (2) whether the District Court erred in excluding evidence of plaintiff's damages. The Ninth Circuit reversed the District Court's grant of summary judgment as to Hofherr's breach of contract claim, and Hofherr does not seek review of that portion of the opinion. However, the Ninth Circuit affirmed the District Court's evidentiary ruling. In so doing, the Ninth Circuit stated in no uncertain terms that *Hofherr had not preserved the damages issue on appeal*:

> An employee cannot quit and sue for post-resignation damages without showing constructive discharge – that is, without showing that "the conditions giving rise to the resignation [are] sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job." The district court ruled that Hofherr was not constructively discharged, a ruling she has not appealed. Accordingly, she cannot recover any damages incurred subsequent to her resignation.

Pet. at 2a (alteration in original) (citation omitted).

The District Court, in its ruling on Respondents' motion for summary judgment, held that Hofherr could not raise a genuine issue of fact that she was constructively terminated: "Plaintiff resigned and there was no constructive termination." Pet. at 16b. The District Court also held that Hofherr's demotion "did not rise to the level of 'intolerable' working conditions that would constitute 'constructive discharge.' " Pet. at 15b. Hofherr did not challenge these ruling. Accordingly, under controlling California law properly applied by the District Court, Petitioner was not entitled to post-resignation damages because, by quitting her job, she had forfeited any right to recover losses beyond that point. Pet. at 3c ("The fact remains, however, that as a matter of law, she was not wrongfully terminated or constructively discharged. Plaintiff should not, therefore, be able to prove or collect damages as if she were.").

No matter how Hofherr frames the damages issue, and contrary to Hofherr's assertion, *the damages issue presented does not "subsume" the constructive discharge claim.*[4] Pet. at 8 n.4. Most assuredly, *VID concedes nothing* in this regard. *See id.* Plain and simple, the District Court found that Hofherr was not wrongfully terminated or constructively discharged. Pet. at 14-15b, 2c-3c. As a result, she is not entitled to recover post-resignation damages as a matter of law.[5] Because Hofherr failed to preserve the issue on

4. The issue Hofherr presented for the Ninth Circuit's review was: "Did the District Court err in excluding evidence of damages which were consequential to plaintiff's demotion and her reasonable efforts to mitigate her damages?"

5. Hofherr refers to these damages in her Petition as "consequential damages sustained as a result of her reasonable

(Cont'd)

appeal, it has been waived. *See National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470, 119 S. Ct. 924 (1999) ("[W]e do not decide in the first instance issues not decided below."); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1, 110 S. Ct. 2892 (1990) ("We decline to consider that argument because it was not raised below.").

Assuming *arguendo* that certiorari jurisdiction is proper, and it is not, Hofherr's arguments fail on the merits as well. First, Hofherr's "post-quit" damages cannot be characterized as "consequential" damages. Consequential damages are ones that are "reasonably contemplated" by the parties. *Ericson v. Playgirl, Inc.*, 73 Cal. App. 3d 850, 854, 140 Cal. Rptr. 921 (1977). Because Hofherr's decision to quit was her own, and because this decision was ruled to be unreasonable as a matter of law, she is not entitled to recover damages flowing from the loss of her job. Indeed, it is difficult to imagine how damages incurred after Hofherr's admittedly unreasonable decision to quit her job could nevertheless be characterized as "proximate" or "consequential." The District Court eloquently disposed of Hofherr's bootstrap argument: "Any damages that flow from [Hofherr's] resignation were proximately caused by her decision to resign, not by defendants' decision to demote her, which is the only act the legality of which remains to be tested." Pet. at 3c.

(Cont'd)

efforts to mitigate her damages by seeking other employment." *See* Pet. at i. This is a red herring. These are the same "post-quit" damages which are not available to her under controlling California law because the District Court concluded that there had not been a constructive discharge or wrongful termination. Pet. at 6a, 14b-15b, 2c-3c. Moreover, her assertion that she quit her job under the guise of "mitigating" her damages is nothing more than a ruse to avoid the constructive discharge doctrine.

In short, a plaintiff cannot simply "quit and sue" and recover damages for the loss of her job. *See Rochlis v. Walt Disney Co.*, 19 Cal. App. 4th 201, 212, 23 Cal. Rptr. 2d 793 (1993). If Hofherr were allowed to recover these termination damages, the concept of constructive discharge would be meaningless, because any employee would quit, sue and seek to recover all damages flowing from the loss of his or her job, regardless how reasonable or unreasonable the decision to quit.

Second, Hofherr's characterization of her decision to quit as resulting from her "reasonable efforts to mitigate her damages" runs contrary to California law. Although Hofherr argues her "duty" to mitigate compelled her to quit and seek comparable employment, Hofherr's argument stands the concept of mitigation on its head. Mitigation is a defense to be used by an employer as a shield against a terminated employee's losses that otherwise would be unreasonably held against the employer. *See Chyten v. Lawrence & Howell Investments*, 23 Cal. App. 4th 607, 616, 22 Cal. Rptr. 2d 392 (1993) (burden on defendant to prove plaintiff's failure to mitigate). Mitigation is not a sword to be used by a plaintiff seeking to justify an otherwise unreasonable decision to quit her job. Moreover, the concept of mitigation requires an employee to make reasonable efforts to find comparable employment, yet the District Court, following settled California precedent, held that Hofherr's decision to quit was unreasonable as a matter of law. Pet. at 14b-15b. Because Hofherr's decision to quit was an unreasonable response to her demotion, her subsequent efforts to find employment cannot at the same time be characterized as reasonable.

Simply put, the concept of mitigation cannot and does not apply when an employee quits.[6] As the District Court noted: "Implicit in [Hofherr's] argument is the assertion that by mitigating her damages, plaintiff suffered additional injury. This argument is alien to the mitigation doctrine, which requires a plaintiff to *avoid* those damages that can be reasonably averted." Pet. at 2c n.1 (emphasis in original).

B. THE QUESTIONS PRESENTED WERE DECIDED UNDER CONTROLLING STATE LAW, AND NO FEDERAL STATUTORY OR CONSTITUTIONAL ISSUES ARE PRESENTED

Relying on well-settled California law (*see Rochlis*, 19 Cal. App. 4th at 214-15; *Warner Bros. Pictures, Inc. v. Bumgarner*, 197 Cal. App. 2d 331, 351-53, 17 Cal. Rptr. 171 (1961)), the District Court concluded that Hofherr, who had resigned, could not recover post-resignation costs. Pet. at 2c. Therefore, she was not entitled to introduce evidence of "post-quit" damages — the damages she incurred subsequent to her resignation. Pet. at 2c ("By introducing evidence of post-quit damages, [Hofherr] essentially seeks to recover the same damages that would be available had she been wrongfully terminated."). The District Court's evidentiary ruling was affirmed on appeal. Pet. at 6a ("she cannot recover any damages incurred subsequent to her resignation").

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6. To highlight the absurdity of Hofherr's "mitigation" argument, the complement would allow an employer sued for wrongful demotion to assert that an employee who had *not* quit had failed to mitigate her damages.

Hofherr asserts that "the District Court erred in its damage analysis and the Ninth Circuit erred in affirming this rule." Pet. at 8. However, Hofherr does not allege that:

> a United States court of appeals has entered a decision in conflict with the decisions of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Sup. Ct. R. 10. Nor does she allege that that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with relevant decisions of this Court." *Id.* Rather, she simply seeks this Court's review of the District Court's application of controlling California law to the issue of damages, which application was affirmed by the Ninth Circuit.

Hofherr attempts to cloak the questions presented for review with federal importance by virtue of the fact that she seeks these damages in a suit in which she alleges, in addition to state law claims, that her Constitutional rights were violated under color of law in violation of 42 U.S.C. § 1983. The fact remains, however, that no federal statutory or Constitutional issues are implicated. *This Petition arises from an order entered by the District Court, and affirmed by the Ninth Circuit, which is silent on federal law. It rests entirely on state law damages principles.*

It is well settled that the purpose of Supreme Court review is: (1) to determine important constitutional questions; (2) to interpret federal statutes; and (3) to maintain harmony among the decisions of the circuit courts of appeals and with decisions of state courts on important questions of federal law. Sup. Ct. R. 10. None of these purposes is implicated; accordingly, certiorari should be denied. *See Leavitt v. Jane L.*, 518 U.S. 137, 144, 116 S. Ct. 2068 (1996) ("we do not normally grant petitions for certiorari solely to review what purports to be an application of state law").[7]

C. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS

Hofherr requests this Court to grant certiorari "to consider the important and far-reaching question of whether an employee who is wrongfully demoted under color of law in violation of public policy and 42 U.S.C. § 1983, is entitled to recover consequential damages sustained as a result of her reasonable efforts to mitigate her damages in accordance with fundamental tort principles." Pet. at 18. Petitioner greatly overstates the significance of the Ninth Circuit's ruling.

First, the Ninth Circuit never even addressed the "important question" that Petitioner posits for review. Hofherr admits as much. *See* Pet. at 8 n.4 ("Apart from a single sentence, the Ninth Circuit fails to address the merits of the damages argument.").

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7. It is also well established that this Court typically defers to the courts of appeals regarding the application and interpretation of state law and only rarely grants review to correct errors in interpreting state law. *See, e.g., McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786, 117 S. Ct. 1734 (1997). There are no errors in interpreting state law present in this case.

Second, no persons other than the parties to this action will be affected by the Ninth Circuit's ruling because the court ordered that its "disposition is not appropriate for publication and may not be cited to or by the courts of this circuit." Pet. at 1a n.*. As such, the case does not present a "far-reaching question." In fact, the question has no "reach" whatsoever and fails to extend beyond the parochial concerns of Hofherr. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422 (1923)) (concept of importance relates to the "importance to the public, as distinguished from that of the parties").

"A petition for a writ of certiorari will be granted only for compelling reasons." Nothwithstanding Hofherr's conclusory assertion of importance and far-reach, this Petition presents no reason, let alone a "compelling reason," that warrants this Court's review.

CONCLUSION

For the reasons set forth above, Respondents VISTA IRRIGATION DISTRICT and JOHN AMODEO respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 00-331

Supreme Court, U.S.
FILED
OCT 10 2000
CLERK

In the Supreme Court of the United States

October Term, 1999

BRENDA HOFHERR,
Petitioner,
vs.
VISTA IRRIGATION DISTRICT,
JOHN AMODEO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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JURISDICTION

Respondents argue that this Court lacks jurisdiction to review this Petition "inasmuch as the questions presented were not preserved on appeal because Petitioner failed to appeal the District Court's findings that she had not been constructively discharged . . .". (Br. in Opp., p. 1) Whether intentionally or not, Respondents miss the point. Petitioner contends here, as she did below, that she should have been entitled to present evidence of damages consequential to the retaliatory demotion/breach of contract notwithstanding the constructive discharge ruling. Contrary to Respondents' inexplicable assertion that "neither the record nor the decision below raised the questions presented in the Petition," (Br. in Opp., p. 5) this issue was extensively briefed in both the District Court and the Ninth Circuit.[1] It is explicitly addressed in the District Court order on the parties' in limine motions (Pet., App. 1c-5c) and, albeit summarily, in the Ninth Circuit Decision (Pet., App. 6a) The fact that the courts below disagreed with Petitioner's analysis does not render the issue waived.

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[1] On appeal, the damage issue raised herein comprised ten pages of the Brief for Appellant, eleven pages of the Appellee's Brief and seven pages of the Appellant's Reply Brief.

I.
PLAINTIFF SHOULD HAVE BEEN ENTITLED TO PROVE AND RECOVER DAMAGES CONSEQUENTIAL TO HER DEMOTION, INCLUDING POST-RESIGNATION DAMAGES FLOWING FROM HER REASONABLE EFFORTS TO MITIGATE HER DAMAGES

As is discussed above, the question presented here, whether petitioner should have been entitled to present evidence of damages which were consequential to the retaliatory demotion/breach of contract and Petitioner's own efforts to mitigate, was argued extensively on appeal, and is properly before this court. The question is not whether Petitioner was constructively discharged, but whether she should have been precluded from recovering damages which are traditionally available for tortious conduct and which would have been available to her had she quietly "accepted" the wrongful conduct, stayed in the inferior employment and done nothing to mitigate the certain and quantifiable damages to which she was subjected. Petitioner contends that to the extent the existing case law permits a damaged employee to stay and sue and recover damages, but denies recovery of damages to those who quit, mitigate and sue, the law is inconsistent and at odds with long-standing, fundamental tort principles.

Ironically, Respondents cite *Ericson* v. *Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 854, 140 Cal.Rptr. 921 for the proposition that "consequential" damages are damages which are reasonably contemplated by the parties. From this assertion they conclude that Hofherr's "post-quit" damages are not "consequential" damages because the decision to quit was hers. (Br. in Opp., p. 7.) The contention is ironic because *Ericson* strongly supports Petitioner's position. First, the *Ericson* court does not define "consequential damages" arising in tort. Rather, it notes that the action at bar is strictly a breach of contract action and that one of the "consequences" affecting the measure of damages in a contract action is that damages are limited to those losses that might reasonably be contemplated or foreseen by the parties. (Id., p. 854.) The *Ericson* court goes on to analyze actions based strictly on contract damages, and expressly distinguishes the measure of contract damages from the measure of tort damages, which were not at issue in that case. The *Ericson* court states: "[T]he cause of action is for breach of contract and not for a tort . . . Defendant is not charged with committing a civil wrong but merely with failing to keep its promise. . . . . damages for breach of contract differ from damages in tort [citations omitted]; accordingly, tort precedents on the measure of damages have no direct relevancy here." (Id., p. 854 [emph. added].)

Tort damages, in contrast to contract damages, are traditionally not limited to those damages "contemplated" by the parties, but rather, extend to all damages proximately caused by the tortfeasor. In the context of employment law, this includes all tort damages, including consequential damages, flowing from an unlawful act against public policy, such as wrongful termination, retaliation or demotion. (*Foley* v. *Interactive Data Corp.* (1988) 47 Cal.3d 654, 665-669, 765 P.2d 373; *Smith* v. *Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 512-513, 196 Cal.Rptr. 916, California Book of Approved Jury Instructions ("BAJI") 10.43)

The same rule is true under federal law. As this Court stated in *Memphis Community School District* v. *Stachura* (1986) 477 U.S. 299, 305-306, 106 S.Ct. 2537, 91 L.Ed.2d 249, "[w]e have repeatedly noted that 42 U.S.C. § 1983 creates "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution. [citations omitted] Accordingly, when §1983 plaintiffs seek damages for violation of constitutional rights, the level of damages is ordinarily determined according to the principles derived from the common law of torts." (*Id., 306* [emph. added.])

This Court continued, "damages in tort cases are designed to provide "compensation for the injury caused to plaintiff by defendant's breach of duty. [citations omitted] To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation ..., personal humiliation, and mental anguish and suffering.'" (*Id.*, pp. 306-307.)

"Section 1983 allows for an award of consequential damages which the trier of fact may reasonably find based on the evidence." (*Schaefer* v. *Tannian*, (E.D.Mich.1995) 895 F.Supp. 175, 179, citing *Memphis Community School Dist.* v. *Stachura, supra*, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) [emph. added].)

Moreover, mitigation of damages by a tort plaintiff is required under both California and federal law. (See, for example, *Parker* v. *Twentieth Century-Fox* (1970) 3 Cal.3d 176, 181; California BAJI 10.16, *Meyers* v. *City of Cincinnati* (6th Cir., 1994) 14 F.3d 1115, 1119 [Plaintiff has duty to mitigate damages in an action under §1983], Ninth Circuit Manual of Model Jury Instructions 7.03.)

Because the instant action sounds in tort, the reliance of the lower courts and Respondents on *Rochlis* v. *Walt Disney Co.* (1993) 19 Cal.App.4th 201, 23 Cal.Rptr.2d 793 is misplaced. As is discussed in the Petition, and not refuted by the Respondents, *Rochlis*, like *Ericson*, is a breach of contract case, not a tort case. No "post-quit" damages were recoverable in

Rochlis because there had been no breach of contract. The *Rochlis* court never addressed the question presented here, to wit, whether damages consequential to an employer's tortious conduct are recoverable.

Respondents' contention that adoption of Petitioner's argument would allow any employee to "quit, sue and seek to recover all damages flowing from the loss of his or her job, regardless how reasonable or unreasonable the decision to quit" (Br. in Opp., p. 8), displays a fundamental misunderstanding of the argument, feigned or not. Petitioner claims only the right to present evidence of her consequential damages and her reasonable efforts to mitigate those damages. If the jury finds that those damages were not proximately caused by the employer, or that Petitioner's efforts to mitigate were not "reasonable" then it will award no damages or reduced damages accordingly. Thus, the damage theory urged by Petitioner does nothing more than place the questions of proximate cause and damages in the hands of the jury, where they have traditionally always been placed. If Respondents have done nothing wrong then they have nothing to fear. The jury will vindicate them. If, on the other hand, Respondents have violated Petitioner's rights, and if her actions to mitigate her damages were reasonable, then damages should be awarded in accordance with long-standing tort principles.

II.
THE QUESTIONS PRESENTED INCLUDE QUESTIONS OF FEDERAL LAW

42 U.S.C. §1983 provides that a person who, under color of any State, subjects a citizen to the deprivation of rights, privileges or immunities secured by the Constitution, shall be liable to the party injured. The question presented here, which falls squarely within the ambit of this federal statute, is under what circumstances and to what extent will a defendant be "liable" for such conduct.

Respondents are an agency and individual who acted under color of the State of California to deprive petitioner of rights and privileges secured by the United States Constitution, to wit, freedom of speech and association, when they subjected her to wrongful demotion and retaliation in violation of public policy in violation of 42 U.S.C. §1983. The fact that their conduct also violates state law does not in any sense abrogate their concurrent liability under federal law. Indeed, the issue presented does raise an important question of federal (and state) law that has not been, but should be, settled by this Court. (Sup. Ct. Rule 10.)

III.
THE QUESTIONS PRESENTED HAVE FAR-REACHING IMPLICATIONS

Notwithstanding the fact that the underlying Ninth Circuit decision is unpublished, the issue presented by this case, does, in fact, have far-reaching implications. If trial courts and intermediate appellate courts continue to take the position that an employee who quits following a wrongful and retaliatory demotion effected in violation of public policy is precluded from recovering damages which are available to an employee who is wrongfully terminated, then employers will continue the practice of wrongfully demoting, rather than terminating, employees in violation of public policy, knowing that they are almost completely insulated from liability for their wrongful conduct. If the wrongfully demoted employee quits, then she is entitled to no damages. If, on the other hand, the wrongfully demoted employee accepts the inferior employment which a terminated employee would not be required to accept, if she sues the employer, the employer can effectively argue that the employee is entitled to little or no damages because she failed to mitigate her damages as is required under the law. If this is the current state of the law, its creates an unjustified anomaly that effectively leaves wrongfully demoted employees without remedy.

Guidance is needed to resolve the current inconsistency between wrongful discharge cases and wrongful demotion cases and to conclusively establish that a wrongfully demoted employee's efforts to mitigate damages which flow from a wrongful demotion should be analyzed within a tort framework of reasonableness in accordance with fundamental tort principles.

Respectfully submitted,

DATED: October 9, 2000

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